UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOSEPH FRUSTACI,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	
	)	
CITY OF SOUTH PORTLAND,	***)***	***Docket No. 00-179-P-H***
	)	
Defendant	***)***	
	)	
and	***)***	
	)	
DAVID and ELIZABETH SAWYER and YOLANDE FOGG,	***)***	
	)	
Parties-in-Interest	***)***	

RECOMMENDED DECISION ON DEFENDANT=S MOTION TO DISMISS

The City of South Portland, having removed this land-use action from the Maine Superior Court (Cumberland County), now moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss all counts against it. Defendant City of South Portland's Motion To Dismiss ("Motion") (Docket No. 3); *see also* Petition & Notice of Removal of Defendants ("Petition") (Docket No. 1). Parties-in-interest David and Elizabeth Sawyer (together, the "Sawyers") and Yolande Fogg support the Motion. Parties-in-Interest David and Elizabeth Sawyer & Yolande Fogg's Consent and Support of Defendant City of South Portland's Motion To Dismiss (Docket No. 5). For the reasons that follow, I recommend that the Motion be granted as to developer Joseph Frustaci's federal causes of action and the case otherwise remanded to state court.

I. Applicable Legal Standards

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending [the] plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if "it appears to a certainty that the plaintiff would be unable to recover under any set of facts." *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

II. Factual Context

For purposes of this Motion I accept the following relevant facts as true. Frustaci, a resident of Cape Elizabeth, Maine, owns a twenty-acre parcel of real estate in the Town of Cape Elizabeth (the "Rosewood Parcel"). Complaint, Title to Real Estate Involved ("Complaint"), attached to Petition, ¶¶ 2, 6, 17. The northeast boundary of the Rosewood Parcel borders the City of South Portland. *Id*. ¶ 6. Two South Portland public streets, Charlotte Street and Edgewood Road, terminate at the northeast boundary line of the Rosewood Parcel. *Id*. ¶ 7.

In 1992 the Town of Cape Elizabeth approved a five-lot subdivision, Rosewood I. *Id*. ¶ 8. Frustaci plans to develop the remainder of the Rosewood Parcel into a fifteen-lot subdivision, Rosewood II, with a U-shaped access road connecting Charlotte Street and Edgewood Road. *Id*. ¶ 9. Charlotte Street and Edgewood Road provide the only feasible means of access to Rosewood II. *Id.* ¶ 19. Frustaci has committed substantial sums of money and time to the development of Rosewood II. *Id*. ¶ 10. The City of South Portland and the residents of Charlotte Street and Edgewood Road have been aware since 1992 of Frustaci's plans to develop Rosewood II by connecting Edgewood Road and Charlotte Street. *Id*. ¶ 18.

The development of Rosewood II will be subject to Cape Elizabeth subdivision and zoning ordinances as well as other applicable laws and regulations. *Id*. ¶ 20. Frustaci and the Cape Elizabeth planner have participated in extensive meetings and communications with South Portland residents and the South Portland Planning Department with respect to Frustaci's plan to develop Rosewood II. *Id*. ¶ 21. The South Portland Planning Department, as well as all owners of real estate abutting Rosewood II, will receive notice of any development applications submitted for Rosewood II pursuant to Cape Elizabeth Ordinance § 16-2-4(7). *Id*. All abutters will have full access to the review process and must be heard by the Cape Elizabeth reviewing boards. *Id*.

In March 1996 Elizabeth Sawyer, who was considering purchasing a home at 10 Charlotte Street, asked Frustaci whether he would be willing to sell a strip of adjacent land, apparently to serve as a buffer between the Charlotte Street property and Rosewood II. *Id*. ¶ 22. The Sawyers purchased 10 Charlotte Street. *Id*. ¶ 23. Frustaci negotiated with the Sawyers for the sale of the strip of land, but the parties were unable to agree on a price. *Id*.

On or about January 20, 2000 the Sawyers and Fogg submitted a request to the City of South Portland that the last twenty-five feet of Charlotte Street be discontinued to "enable the City and its citizens a meaningful opportunity to address and influence the imminent development of a parcel of land known as the Rosewood Subdivision Phase II." *Id*. ¶ 24. The City of South Portland held a Planning Board hearing on the request on March 14, 2000. *Id*. ¶ 25. The Planning Board on March 16, 2000 recommended that the city discontinue the last twenty-five feet of Charlotte Street "based on the land use and planning impacts of the request," with the city retaining an easement for utilities and pedestrian access. *Id.* ¶¶ 26-27.[1] The City of South Portland held a workshop on April 10, 2000 and

[1] The Planning Board noted, "Ensuring this street is not extended prevents both possible declines in public safety, from traffic increase, and possible increase in demand on city services." Memorandum dated March 16, 2000 from Planning Board to City Council ("Planning Board Memorandum"), attached as Exh. E to Complaint, at 4.

a public hearing on April 19, 2000 concerning the matter. *Id*. ¶ 28. At the April 19th public hearing, Frustaci entered in evidence before the City Council a letter from an appraiser indicating that discontinuance of Charlotte Street would decrease the value of his abutting property by more than $180,000. *Id*. ¶ 32. That evidence was unrebutted. *Id*.

The City Council on April 19, 2000 issued Discontinuance Order No. 127-99/00 (the "Discontinuance Order") discontinuing the final twenty-five feet of Charlotte Street, retaining an easement to repair and maintain existing public utility lines and expressly releasing "any retained public right to vehicular access to and across the property or access by any motorized vehicle other than those associated with the reserved easement rights." *Id*. ¶¶ 29, 31. The Discontinuance Order, which was filed with the South Portland City Clerk on April 20, 2000, also stated that no damages should be paid to the abutters: Frustaci, the Sawyers and Fogg. *Id*. ¶¶ 29-30.

The City Council failed to hire an appraiser or engage in other independent fact-finding activities to determine the amount of damages, if any, to Frustaci's abutting property caused by the Discontinuance Order. *Id*. ¶ 33. The Discontinuance Order has caused Frustaci to suffer a deprivation of property rights, including but not limited to an abutter's right of access to a public way, including the right of ingress and egress between the Rosewood Parcel and Charlotte Street, as well as the right to access the general road system via Charlotte Street, the benefit of having the City of South Portland maintain Charlotte Street for the safety and convenience of travelers, and the benefit of access to South Portland utilities, including water, sewer and storm drain. *Id*. ¶ 34. The deprivation of Frustaci's property rights has resulted in a diminution of the fair market value of his property in excess of $180,000. *Id*. ¶ 35.

The Discontinuance Order will not increase the opportunity for the City of South Portland or South Portland residents to participate in the planning or review process with respect to Rosewood II.

Id. ¶ 36. Neither the South Portland Planning Board nor the City Council made a determination that the public purpose for which Charlotte Street was accepted as a city street had been altered or was no longer viable or justified. *Id*. ¶ 37. The Discontinuance Order was issued to serve the private purposes of, and to provide a private benefit to, the Sawyers and Fogg. *Id*. ¶ 38.

III. Analysis

Frustaci alleges that the Discontinuance Order:

(i) constitutes a taking of private property without just compensation or public purpose in violation of the federal and Maine constitutions and a taking of private property without justifying public exigencies in violation of the Maine constitution (Count I), *id*. ¶¶ 40-42;

(ii) contravenes his substantive due-process rights pursuant to the federal and Maine constitutions (Count II), *id*. ¶¶ 43-47;

(iii) violates his civil rights pursuant to 42 U.S.C. § 1983 and 5 M.R.S.A. § 4682 by virtue of the asserted taking without public purpose and substantive-due process violations (Count III), *id.* ¶¶ 48-50;

(iv) constitutes illegal spot zoning (Count IV), *id*. ¶¶ 51-52, and a defective discontinuance pursuant to 23 M.R.S.A. §§ 3026 and 3029 (Count V), *id*. ¶¶ 53-55; and

(v) entitles him to an award of statutory damages pursuant to 23 M.R.S.A. § 3029 (Count VI), *id*. ¶¶ 56-58.

The City of South Portland argues *inter alia* that none of Frustaci's federal claims withstands a motion to dismiss.[2] Motion at 3-10. I agree.

[2] The City of South Portland perceives Count IV (illegal spot zoning), for which Frustaci delineates no statutory or constitutional basis, *see* Complaint ¶¶ 51-52, as stating a claim for a violation of procedural due process. *See* Motion at 7. Frustaci clarifies in his opposing memorandum that he asserts three constitutional claims: taking without just compensation, taking without public purpose and violation of substantive due process. Plaintiff's Opposition to Defendant City of South Portland's Motion To Dismiss ("Opposition") (Docket No. 6) at 6. Thus, whatever the genesis of the spot-zoning claim, I do not construe it to implicate procedural due process or (continued…)

A. Substantive Due Process

The First Circuit has made clear "that a regulatory board does not transgress constitutional due process requirements merely by making decisions for erroneous reasons or by making demands which arguably exceed its authority under the relevant state statutes," noting that it has "left the door slightly ajar for federal relief [based on substantive due process] in truly horrendous situations." *Licari v. Ferruzzi*, 22 F.3d 344, 350 (1st Cir. 1994) (citations and internal quotation marks omitted). "Nevertheless, the threshold for establishing the requisite abuse of government power is a high one indeed." *Id*. (citation and internal quotation marks omitted).

Such "horrendous" situations include decision-making based on political affiliation, belief or immutable characteristic of the plaintiff; they do not include a mere claim that a "board exceeded, abused or distorted its legal authority . . . , often for some allegedly perverse (from the developer's point of view) reason." *Id*. at 349 (citation and internal quotation marks omitted). This "approach to such claims in land use planning disputes" in turn rests on a "sound basis":

> Substantive due process, as a theory for constitutional redress, has . . . been disfavored, in part because of its virtually standardless reach. To apply it to claims [alleging that permitting officials were motivated by political factors and parochial views of local interests] would be to insinuate the oversight and discretion of federal judges into areas traditionally reserved for state and local tribunals.

Id. at 350 (citation and internal quotation marks omitted).

Frustaci essentially claims that the City of South Portland improperly granted the Discontinuance Order on the basis of its desire to benefit the Sawyers and Fogg at the expense of the public in general and himself in particular, without recompense for the diminution in the value of his property. He thus presents a quintessential run-of-the-mill land-use dispute of the sort that the First Circuit has clarified does not implicate substantive due-process concerns. Frustaci attempts to

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any federal right other than those asserted elsewhere in the Complaint.

distinguish *Licari* on grounds that (i) it applies only to planning and zoning not to discontinuance of a public way (which he likens to an eminent-domain proceeding) and (ii) a claim for substantive due process may rest on violation of a specific liberty or property interest, thus obviating the need to show "horrendous" circumstances. Opposition at 7-10; *see also Cruz-Erazo v. Rivera-Montañez*, 212 F.3d 617, 622 (1st Cir. 2000) ("There are two theories under which a plaintiff may bring a substantive due process claim. Under the first, a plaintiff must demonstrate a deprivation of an identified liberty or property interest protected by the Fourteenth Amendment. Under the second, a plaintiff is not required to prove the deprivation of a specific liberty or property interest, but, rather, he must prove that the state's conduct 'shocks the conscience.'") (citations and internal quotation marks omitted).

Neither attempt succeeds. Although *Licari* itself involved planning-board matters (revocation and delayed issuance of building permits), its reasoning applies with equal force both to land-use matters in general and to this dispute in particular. *See Licari*, 22 F.3d at 350 (noting basis for "our approach to such claims in land use planning disputes"). Had Frustaci been advised by the Town of Cape Elizabeth that, as a condition of the grant of approval of the Rosewood II subdivision, he could funnel internal subdivision streets only to Edgewood Road, he would have suffered similar harm in the guise of a planning/zoning decision.

Frustaci cites two Law Court cases, *Jordan v. Town of Canton*, 265 A.2d 96 (Me. 1970), and *August Realty, Inc. v. Inhabitants of Town of York*, 431 A.2d 1289, 1291 (Me. 1981), for the proposition that certain "sticks" in the bundle of his property rights have been identified as implicating constitutional concerns. Opposition at 9. However, neither case concerns the recognition of an identified property interest in the context of substantive due process. *See Pittsley v. Warish*, 927 F.2d 3, 7 (1st Cir. 1991) ("Under the second theory of substantive due process, plaintiffs must establish that the [conduct complained of] violated a specific constitutional guarantee or liberty interest protected by

the substantive due process clause."). In any event, the First Circuit in *Licari* appears to set forth a framework for the analysis of all substantive due-process claims emanating from land-use disputes. *See, e.g., Licari*, 22 F.3d at 349 ("This Court has repeatedly held . . . that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process.") (citations and internal quotation marks omitted).

Frustaci's claim of violation of his federal right to substantive due process accordingly warrants dismissal.

B. Taking Without Just Compensation

Frustaci's claim of taking without just compensation founders on a different shoal: It is not yet ripe for adjudication. "[A] plaintiff seeking to invoke the Takings Clause in a federal court without first exhausting state remedies has the burden of proving the inadequacy of those remedies." *Gilbert v. City of Cambridge*, 932 F.2d 51, 65 (1st Cir.1991); *see also Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.").

State procedures for remedying an alleged taking include an action for "inverse condemnation." *Williamson*, 473 U.S. at 196. Such an action is available in Maine. *See, e.g., Larrabee v. Town of Knox*, 744 A.2d 544, 545 n.3 (Me. 2000) (observing that "[i]nverse condemnation is a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.") (citations and internal quotation marks omitted). Frustaci acknowledges that his federal claim for a taking without just compensation "may not be fully ripe" until determinations are made on his demands for statutory damages pursuant to 23 M.R.S.A. § 3029 and for inverse condemnation pursuant to the

Maine constitution. Opposition at 6-7. This being the case, his federal claim of taking without just compensation properly is dismissed.

C. Taking Without Public Purpose

Frustaci finally presses a federal claim that apart from failing to pay just compensation the City of South Portland impermissibly took his property for the private benefit of individual abutters to the Rosewood Parcel. *See* Opposition at 12. The Fifth Amendment, as applied to the states through the Fourteenth Amendment, commands that "private property [shall not] be taken for public use, without just compensation." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 231 (1984). The Supreme Court has construed the public-use component of this requirement as "coterminous with the scope of a sovereign's police powers," observing, "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id*. at 240-41. Moreover, "[t]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose." *Id*. at 243-44. The scope of judicial review of a legislature's (or, in this case, a municipality's) determination of what constitutes a public use is "extremely narrow," with deference to be accorded to such a judgment "unless the use be palpably without reasonable foundation." *Id*. at 240-41 (citation and internal quotation marks omitted). Policymakers' alleged motives for effectuating the taking are irrelevant. *See, e.g., Pastan v. City of Melrose*, 601 F. Supp. 201, 203 (D. Mass. 1985) ("Hawaii . . . stands for the proposition that, as long as property taken by eminent domain is dedicated to a public purpose, the motives of the taking authority are irrelevant.").

Frustaci asserts that "[t]he Discontinuance Order was issued to serve the private purposes of and to provide a private benefit to the other abutters David and Elizabeth Sawyer and Yolande Fogg."

Complaint ¶ 38. However, in a March 16, 2000 memorandum to the City Council that Frustaci incorporates by reference in the Complaint, *see id*. ¶ 26 and Exh. E thereto, the Planning Board concluded, "Ensuring this street is not extended prevents both possible declines in public safety, from traffic increase, and possible increase in demand on city services." Planning Board Memorandum at 4. Such a document may be considered in the context of a motion to dismiss. *See, e.g., Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir.1996) (court may properly consider relevant entirety of document integral to or explicitly relied upon in complaint, even though not attached to complaint, without converting motion to dismiss into summary-judgment motion).

Frustaci contends that "[n]o 'public purpose' or legitimate state interest is advanced when a City uses its discontinuance authority to hinder a development in a neighboring town by blocking access to a public street. . . . Claiming that it serves the City's planning interests does not legitimize the action." Opposition at 12. Even assuming *arguendo* that the City of South Portland set out to disrupt the adjoining subdivision and/or confer a benefit on three of its residents, Frustaci fails to demonstrate lack of public purpose as that concept is elucidated in *Hawaii*. The Complaint and attached Planning Board Memorandum reveal that the City of South Portland predicated the Discontinuance Order at least in part on concerns about safety and traffic. Public safety and traffic regulation fall within the scope of sovereign police power. *See, e.g., Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 67 (1st Cir. 1997) ("the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort and quiet of all persons.") (citation and internal quotation marks omitted). A judgment that discontinuance of a road abutting a planned subdivision could advance these public purposes is not palpably lacking in reasonable foundation. Conversely, discontinuance of a road abutting such a planned development is rationally related to goals of minimizing traffic and enhancing safety. The Complaint and incorporated

documents, as a whole, make clear that Frustaci as a matter of law cannot show entitlement to relief on his federal claim of taking without public purpose. Accordingly, this claim as well is properly dismissed.[3]

IV. Conclusion

For the foregoing reasons, I recommend that the Motion To Dismiss be **GRANTED** without prejudice as to that portion of Count I alleging a taking without just compensation in violation of the federal Constitution and with prejudice as to (i) that portion of Count I alleging a taking without public purpose in violation of the federal Constitution, (ii) that portion of Count II alleging a violation of rights to substantive due process pursuant to the federal Constitution and (iii) that portion of Count III alleging violation of 42 U.S.C. § 1983. I further recommend that, in view of the recommended dismissal of all claims over which the court has original jurisdiction and the notably local nature of the interests at stake,[4] the court decline to exercise its supplemental jurisdiction as to the remaining pendent state-law claims, *see, e.g.*, 28 U.S.C. § 1367(c); *Mill Invs., Inc. v. Brooks Woolen Co.*, 797 F. Supp. 49, 52 (D. Me. 1992), and **REMAND** those state claims to the Maine Superior Court (Cumberland County).

[3] A takings claim predicated on lack of public purpose does not implicate the same ripeness concerns as a claim based on lack of just compensation. *See, e.g., McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997) ("The McKenzies need not pursue state procedures for a claim that the City took the privacy buffer without a justifying public purpose, however, because this is a Constitutional violation even if compensation is paid.").

[4] The First Circuit has cautioned that "[a] federal court . . . should not . . . sit as a zoning board of appeals." *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982) (citation and internal quotation marks omitted). Nor should the court, in this case, sit as the equivalent of the Maine Superior Court conducting a review pursuant to Me. R. Civ. P. 80B of municipal discontinuance of a road.

NOTICE

A party may file objections to those specified portions of a magistrate judge=s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court=s order.

Dated this 11th day of September, 2000.

_____

David M. Cohen
United States Magistrate Judge

STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-179

FRUSTACI v. CITY OF SOUTH PORTLA Filed: 06/15/00
Assigned to: JUDGE D. BROCK HORNBY Jury demand: Plaintiff
Demand: $0,000 Nature of Suit: 440
Lead Docket: None Jurisdiction: Federal Question
Dkt # in APPEALS COURT : is AP-00-46

Cause: 28:1446 Notice of Removal

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